

REMARKS

Claims 1 and 24 have been amended to require that a pollutant penetration limiting effective amount of the claimed cubic gel particles be applied to keratin materials in need of protection from the harmful effects of pollution. Support for these amendments exists throughout the present specification. Claims 28-30, which were directed to similar subject matter, have been canceled.

New claim 31 has been added. This claim is original claim 12 written in independent form. Accordingly, claim 12 has been canceled. The dependency of claims 13-18 has been changed from claim 12 to claim 31.

New claim 32 has also been added. This claim corresponds to claim 24, except that it requires “applying to keratin material in need of protection from the harmful effects of pollution adhesion to skin a composition comprising a pollutant adhesion limiting effective amount of cubic gel particle.” Support for this claim exists throughout the entire specification, particularly in the examples.

New claims 33-41 have been added. These claims require the presence of phytanetriol in the cubic gel particles set forth in claim 4. Support for these claims exists throughout the entire specification.

Claims 1-11, 13-27 and 31-41 are currently pending, although claims 25 and 27 have been withdrawn from consideration.

Initially, Applicants would like to thank Examiner Webman for indicating that claims 12-18 would be allowable if rewritten in independent form. By adding independent claim 31 (which is claim 12 in independent form) and by changing the dependency of claim 13-18 so

Application No. 09/875,993

Response to Office Action dated April 27, 2004

that these claims depend from claim 31, Applicants have effectively rewritten claims 12-18 in independent form. Accordingly, Applicants respectfully submit that claims 13-18 and 31 are in condition for allowance.

The Office Action rejection claims 1-11, 19-24, 26, 28 and 29 under 35 U.S.C. § 103 as obvious over U.S. patent 6,071,524 (“Ribier”). In view of the following comments, Applicants respectfully request reconsideration and withdrawal of this rejection.

The present invention relates to methods of protecting keratin materials from the harmful effects of pollution by applying the claimed cubic gel particles to keratin materials (1) in need of protection from the harmful effects of pollution (2) in an amount sufficient to limit the amount of pollutants penetrating into and/or adhering onto the skin. (1) and (2) above are real limitations which must be taught or suggested by the cited art before a rejection under 35 U.S.C. § 103 can properly be made. *See, Abbott Laboratories v. Baxter Pharmaceutical Products, Inc.*, 67 U.S.P.Q.2d 1191 (Fed. Cir. 2003) (“effective amounts” are not necessarily disclosed by prior art compositions containing the claimed active ingredient; the desired effect must be achieved); *Jansen v. Rexall Sundown Inc.*, 68 U.S.P.Q.2d 1154 (“in need thereof” language is not satisfied if the active ingredient is administered for a purpose other than the claimed purpose).¹ However, Ribier neither teaches nor suggests either of these limitations, so it cannot render the claimed methods obvious.

In particular, the Federal Circuit’s recent decision in *Jansen* resolves the prior art issues in this case and requires that the currently pending prior art rejection be withdrawn.

¹ Copies of these two decisions are attached hereto for Examiner Webman’s convenience.

In *Jansen*, the claims were directed to methods of treating or preventing macrocytic-megaloblastic anemia comprising administering effective amounts of folic acid and vitamin B₁₂ to humans in need thereof. *Jansen* at 1157. In interpreting these claims, the Federal Circuit ruled that the claims require the specific intent to achieve the claimed objective (treatment or prevention of macrocytic-megaloblastic anemia). Specifically, the Federal Circuit stated that:

. . . the claim preamble sets forth the objective of the method, and the body of the claim directs that the method be performed on someone ‘in need.’ In both cases, the claims’ recitation of a patient or a human ‘in need’ gives life and meaning to preambles. [Citation omitted]. The preamble is therefore not merely a statement of effect that may or may not be desired or appreciated. Rather, **it is a statement of the intentional purpose for which the method must be performed.** We need not decide whether we would reach the same conclusion if either of the ‘treating or preventing’ phrase or the ‘to a human in need thereof’ phrase was not a part of the claim; **together, however, they compel the claim construction arrived at by both the district court and this court.**

Jansen at 1158 (emphasis added). The Federal Circuit further explained that:

the ‘083 patent claims are properly interpreted to mean that the combination of folic acid and vitamin B₁₂ **must** be administered to a human with a recognized need to treat or prevent macrocytic-megaloblastic anemia.

Jansen at 1158 (emphasis added).

Thus, according to the Federal Circuit, claims directed to methods of treatment to be performed on those in need of such treatment require the specific intent to effect such treatment.

In the present application, the pending claims are directed to methods of protecting keratin materials from the harmful effects of pollution by topically applying a composition containing a pollutant penetration/adhesion limiting effective amount of cubic gel particles to keratin materials in need of such protection. In accordance with the Federal Circuit's decision in *Jansen*, these claims must be interpreted to require the specific intent to effect protection of keratin materials from the harmful effects of pollution.

Ribier does not teach or suggest such specific intent: that is, Ribier does not state that cubic gel particles should be used to protect keratin materials from pollution's harmful effects. Moreover, Ribier does not constitute a cubic gel particle-containing product for which advertisements, instructions and/or directions relate to protecting keratin materials from pollution's harmful effects. In view of such fatal deficiencies, Ribier cannot teach or suggest the claimed methods.

Ribier does not teach, suggest or recognize any benefits associated with limiting pollution penetration/adherence. Ribier merely discloses antioxidants and free radical scavengers, agents which do not prevent pollution from adhering onto skin or the damage caused by the pollution's adherence and subsequent penetration – these agents work via a different mechanism of action (related to minimizing the effects of free radicals and/or oxidation). Nowhere does Ribier teach or suggest applying any agent to skin in need of protection from the harmful effects of pollution in an amount sufficient to limit the amount of

Application No. 09/875,993

Response to Office Action dated April 27, 2004

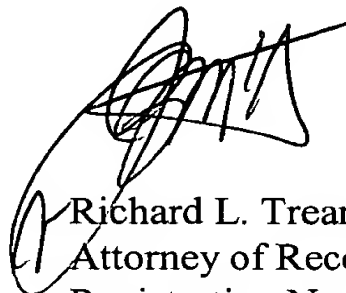
pollutants penetrating into and/or adhering onto the skin, let alone applying the claimed cubic gel particles in this manner. In stark contrast, the claimed invention requires such application of the claimed cubic gel particles. Accordingly, the rejection under § 103 is improper and should be withdrawn.

In view of the above, Applicants respectfully request reconsideration and withdrawal of the § 103 rejection.

Applicants believe that the present application is in condition for allowance. Prompt and favorable consideration is earnestly solicited.

Respectfully submitted,

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